U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 13 July 2005

Case No.: 2004-LHC-01962

OWCP No.: 08-116865

In the Matter of:

DEBRA A. SLOCUMB,
Claimant

v.

AGRIFOS, LP,
Employer, and

ZURICH AMERICAN INS. CO.,
Carrier.

Appearances: Dennis L. Brown, Esq.
For the Claimant

Colin D. Sherman, Esq.
Sean Cody, Esq.
For the Employer and Carrier

Before: Russell D. Pulver
Administrative Law Judge

DECISION AND ORDER GRANTING BENEFITS

This case arises from a claim for compensation brought under the Longshore and Harbor Worker's Compensation Act, as amended, 33 U.S.C. § 901 ("the Act"). The Act provides compensation to certain employees (or their survivors) engaged in maritime employment for occupational diseases or unintentional work-related injuries, irrespective of fault, occurring on the navigable waterways of the United States or certain adjoining areas, resulting in disability or death. This claim was brought by Debra Slocumb ("Claimant") against Agrifos, LP ("Employer") and Zurich American Insurance Co. ("Carrier"), arising from injuries sustained to her right hip and lower back while employed by Employer.

On June 10, 2004, the Director, Office of Worker's Compensation Programs ("OWCP"), referred this case to the Office of Administrative Law Judges ("OALJ") for a hearing. This case

was assigned to the undersigned on August 24, 2004. A formal hearing was held before the undersigned on January 13, 2005 in Houston, Texas, at which time all parties were afforded a full and fair opportunity to present evidence and arguments. Administrative Law Judge Exhibits ("AX") 1-5, Claimant's Exhibits ("CX") 1-23, and Respondent's Exhibits ("RX") 1-37 and 23(a) were admitted into the record. Claimant and William Dwight Slocumb testified at the hearing.

The findings and conclusions which follow are based on a complete review of the record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

STIPULATIONS

The parties stipulate and I find that:

1) Claimant reached maximum medical improvement on December 18, 2003.

2) An employer/employee relationship existed as between Claimant and Employer during the relevant periods.

3) Coverage under the Act exists as to the claim against the Employer.

4) The claim was timely noticed and filed.

5) Claimant's average weekly wage at the time of injury was $1087.92.

6) Claimant was paid $725.28 per week in compensation, beginning from February 1, 2000 and continuing at least through the date of trial.

ISSUES

The issues remaining to be resolved are:

1) Causation of Claimant's injuries.

2) The nature and extent of Claimant's disability.

3) Employer's entitlement to Section 8(f) Relief.

4) Claimant's entitlement to medical expenses.

5) Interest on past due benefits, if any.

6) Assessment of attorney fees and costs, if any.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Summary of the Evidence

In September of 1987, Debra Slocumb ("Claimant") began working as a longshore operator for Mobile Mining and Minerals, the predecessor to Agrifos, LP ("Employer"), and by 1998 Claimant had worked her way up to a Class A position. Transcript of Hearing, January 13, 2005 ("TR") at 35. Claimant was first injured on or about July 24, 1990. TR at 99. Claimant was releasing an ammonia barge when she stepped off of an unlighted pier onto cracked cement, causing her to twist her ankle and hit her back on a broken slab of cement. TR at 99-100. Claimant was immediately taken to the emergency room. TR at 100. Claimant reported that she attempted to work but could only perform jobs if she was active or walking; she could not sit, stand, or sleep because of her back pain. TR at 101. After approximately one week of work Claimant was put in traction for one week. *Id.* Claimant reported that Dr. Shaw, an orthopedic surgeon, told her that she had severe low-back strain and bulging in disk L5-S1. TR at 101-102.

The plant physician, Dr. Mayer, had Claimant participate in a work-hardening program for four to six weeks before he cleared Claimant to return to work in March 1991. TR at 103. Claimant testified that she still experienced lower back pain after she returned to work. *Id.* Dr. McPearson, a chiropractor, treated Claimant for about two years after the 1990 accident. TR at 103-104. Claimant's husband[1] testified that there was no light duty work on the docks or the plant where Claimant worked, and the work was physically demanding. TR at 143, 144. Additionally, Mr. Slocumb reported that as of 1998, Claimant was the only woman working as a Class A operator at Employer's facility. TR at 143. Sometimes Claimant's duties required her to scale ships or barges that were inaccessible from the docks. TR at 37.

On November 24, 1998 Claimant was working on the graveyard shift cleaning up spilled phosphoric rock. TR at 36. She was on her knees shoveling the wet rock out from underneath a motor mount that was only two to three feet tall and throwing shovelfuls from side to side. TR at 38. Just before the cleanup was complete, Claimant felt pain and a pop in her hip and through her lower back, and she stopped working. TR at 39. Claimant's husband testified that when no one was injured in a month, each team member would get a safety bonus. TR at 153. When workers did not get the bonus because a team member was injured, the workers were sometimes rude or threatening. *Id.* Claimant testified that she had feared that her team members would be sarcastic and complain about losing a safety incentive bonus if she reported an injury. TR at 86. She returned to work for the next several days but experienced problems with her right hip and groin area and her lower back. TR at 44. Claimant told one coworker, Mr. Cain, about the injury, but otherwise did not report it until the next evening, after Mr. Slocumb's urging, when she was experiencing more soreness. TR at 40, 143.

When Claimant first sought medical treatment she was away for the Thanksgiving holiday, visiting family in Illinois. TR at 45. Claimant testified that she had thought her injury

[1] At the time of trial, Claimant's husband was a unit manager for Employer at the same facility where Claimant was employed, and he has been working at that plant for various owners for about 36 years. He testified that in 1998 he was a shift supervisor for the entire plant. TR at 141.

would subside during the holiday and her subsequent time off, but her symptoms increased such that she had difficulty sitting still or sleeping. TR at 40, 44. Dr. Perona, an Orthopedic Surgeon in Illinois, diagnosed Claimant with a tear in the acetabulum in her right hip. TR at 46. She put Dr. Perona's bill on her personal insurance, she testified, because she did not have the appropriate paperwork with her for a worker's compensation claim. TR at 84. Dr. Perona referred Claimant to Dr. Landon in Houston, and from April 1, 1999 through March, 2001, Dr. Landon treated Claimant for hip problems. TR at 47, 48; CX 9. On April 1, 1999, Dr. Landon opined that Claimant still had an acetabular tear associated with her trauma and dysplasia. CX 9 at 19.

While Claimant was seeing Dr. Landon, she continued to have difficulty meeting the physical demands of her job and she was taking anti-inflammatory drugs. TR at 48. On June 28, 1999 Dr. Landon recommended that Claimant have an osteotomy for her hip problem, and he repeated that recommendation on September 13 and December 13, 1999. However, the surgery was never authorized by the Carrier. TR at 50, 51; CX 9 at 8, 21. Dr. Landon also prescribed Claimant with Vioxx for her hip problems. CX 9 at 8.

Initially, Dr. Landon released Claimant to return to work, but he restricted her from squatting, kneeling, climbing, or lifting more than twenty pounds. TR at 57; CX 21. Following his evaluation, Claimant contacted the U.S. Department of Labor for vocational help and Ms. Eva Haier, a vocational counselor, assisted Claimant with vocational rehabilitation. TR at 57. After Claimant's repeated complaints of pain and problems, Dr. Landon took her off of work on January 31, 2000. TR at 54. Claimant was never released to return to work for Employer and Employer terminated her, per union contract, in 2003. TR at 104.

On February 14, 2000, Dr. Landon diagnosed Claimant with spondylolisthesis with disc bulging and mild nerve compression and he had her begin physical therapy treatments. CX 9 at 4. One month later Dr. Landon opined that an osteotomy was no longer justified but it might be worthwhile to consider arthroscopic surgery on her hip. CX 9 at 21. He also reported that Claimant was responding well to physical exercise but still had bilateral pain and popping in her hip, and she was temporarily disabled. *Id.*

In April of 1999 Claimant was in a car that was rear ended in slow moving traffic. TR at 130. Dr. Watters opined that if there was not a marked increase in Claimant's pain from the accident, he would not believe it contributed to the 1998 injury. CX 18 at 37. Claimant testified that nothing ever came of the accident, and she did not even remember telling Dr. Watters about it. TR at 129.

When Claimant complained of back problems, Dr. Landon would reply that he was a hip doctor and he focused on her hip problems. TR at 48, 146. On March 13, 2001, Dr. Landon opined that Claimant remained disabled and he referred Claimant to Dr. Watters[2], a spinal specialist, for her persistent back pain that was not managed with conservative therapy. CX 9 at 3.

[2] Dr. Watters is Board certified in orthopedic surgery and spinal surgery, and he tailored his medical practice to focus on spinal surgery for the past 15 years. CX 18 at 4, 5. He has been practicing Orthopedics for 24 years. CX 18 at 54.

After Dr. Landon's referral, Claimant first saw Dr. Watters on September 6, 2001. CX 18 at 5. Dr. Watters did not treat Claimant for any hip problems. CX 18 at 42. For approximately one year, overlapping with Dr. Landon and Dr. Watters' treatment, the Department of Labor sponsored Claimant's participation in a surgical technician training program. TR at 60, 61. Claimant completed the classroom training successfully, but she experienced increased pain from the clinical training and Dr. Watters and Ms. Haier agreed that she should withdraw from the program. TR at 62. Then Claimant worked with Ms. Haier to find new employment without retraining. *Id.*

On Claimant's first visit, Dr. Watters diagnosed Claimant with lumbar radiculitis, or pain originating in the lumbar spine and radiating down her leg, and he ordered more imaging of her spine. CX 18 at 8, 9. After an MRI of Claimant's back was taken on December 23, 2001, Dr. Watters diagnosed Claimant with grade 1 spondylolisthesis, or mild slippage of the spine, and advanced degeneration of the disk at L5-S1. CX 18 at 11. Dr. Watters opined that Claimant experienced a 50% reduction in pain from an epidural injection on February 11, 2002, but two subsequent injections were not effective in reducing Claimant's pain. CX 18 at 12, 13. After the third injection, which was in April of 2002, Dr. Watters noted that Claimant lost the temporary relief from the first injection and she had increased pain and difficulty sleeping. CX 18 at 14. A discogram of Claimant's damaged disk on May 22, 2002 showed a large annular tear in the L5-S1 disk. CX 18 at 14, 16. According to Dr. Watters, an annular tear means that the surrounding tissue has broken down and it can be a source of pain and the disk will continue to decline. CX 18 at 18.

Subsequently, Dr. Watters recommended that Claimant's torn disk be surgically removed to try to get the two vertebrae at the L5-S1 level to fuse together. *Id.* On August 12, 2002 Claimant underwent an anterior interbody fusion surgery, which involved removing the torn disk and inserting a titanium cage in its place to eliminate the motion that Dr. Watters identified as the cause of Claimant's pain. CX 18 at 21. Dr. Watters opined that there was a two- to three-month passive recovery period when Claimant wore a brace, and in a follow up CT scan of her lumbar spine in April of 2003, it appeared that Claimant had fusion. CX 18 at 26, 27. Additionally, Claimant attempted to participate in physical therapy after the surgery, but had to discontinue it because the therapy produced pain in the lower left side of her back. TR at 63.

On December 18, 2003, Dr. Watters reported that Claimant reached maximum medical improvement since she was doing well with her symptoms, other than persistent groin pain and unrelated upper extremity discomfort. CX 18 at 28. Additionally, Dr. Watters' clinic performed a functional capacity evaluation of Claimant on January 8, 2004. CX 18 at 28. In the evaluation Dr. Watters found that Claimant could perform light work for eight-hour days, and he declared that Claimant had a five percent whole body impairment rating. CX 18 at 29, 30. Dr. Watters did not release Claimant to return to her "fairly vigorous" work at Agrifos, and in testimony he opined that she would not be able return to that type of work. CX 18 at 31, 32. He also testified that he did not believe Claimant would require further surgery, but he would not rule out the need for future diagnostic tests. CX 18 at 43. Finally, Dr. Watters opined that Claimant's need for the surgery and other care from him resulted from the 1998 accident. CX 18 at 38.

After Dr. Watters released Claimant to do sedentary work with restrictions, Ms. Haier placed Claimant in computer job-skill training classes. TR at 64-66. After Claimant completed some computer training, Ms. Haier kept Claimant informed of job openings and had Claimant apply for five jobs per day. *Id.* Additionally, Ms. Haier had Claimant keep a log of all her applications. TR at 66; CX at 23. Claimant testified that all the employers with secretarial positions wanted employees with experience, and none of them called her back. TR at 68. Eventually Claimant accepted a job at Kohl's Department Store as a jewelry sales associate, paying $7.50 an hour[3]. TR at 68, 69. At the time of the hearing Claimant was still working at Kohl's, although she was hired as a seasonal employee. TR at 71. Claimant testified that her job does not require any heavy lifting and she can get a break whenever she needs one so that she does not aggravate her condition. TR at 69. At trial Claimant reported that she was taking Celebrex and Tylenol as needed, she still has hip pain occasionally in her right groin area, and sometimes her back aches or has sharp pains. TR at 71, 72.

II. Discussion of the Law and Facts

Causation

To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984); *Kelaita v. Triple A Mach. Shop,* 13 BRBS 326 (1981), *aff'd sub nom. Kelaita v. Director, OWCP,* 799 F. 2d 1308 (9th Cir. 1986). Once this *prima facie* case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. *Gooden v. Director, OWCP*, 135 F.3d 1066, 1068 (5th Cir. 1998); *Parsons Corp. of California v. Director, OWCP*, 619 F.2d 38 (9th Cir. 1980); *Butler v. District Parking Management Co.*, 363 F.2d 682 (D.C. Cir. 1966); *Ranks v. Bath Iron Works Corp.*, 22 BRBS 301, 305 (1989); *Kier, supra*. Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. *Brown v. Pacific Dry Dock*, 22 BRBS 284 (1989); *Rajotte v. General Dynamics Corp.*, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046, 1049 (5th Cir. 1983); *Volpe v. Northeast Marine Terminals*, 671 F.2d 697 (2d Cir. 1981); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. *Sprague v. Director, OWCP*, 688 F.2d 862 (1st Cir. 1982); *Holmes, supra*; *MacDonald v. Trailer Marine Transport Corp.*, 18 BRBS 259 (1986).

[3] The first job offer Claimant received was from Kohl's, and later she received callbacks from Target and a nursing home. TR at 68. Claimant asked for $8 per hour in her applications, but she was told by several employers that she would not get that much. TR at 84. A Kohl's manager told Claimant that $8 an hour was high and Claimant testified that general sales associates outside of the jewelry department make $6.50 per hour. *Id.*

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. *See* 33 U.S.C. § 902(2); *U.S. Industries/Federal Sheet Metal, Inc.*, 455 U.S. 608, 615 (1982), *rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.*, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to section 2(2) of the Act. *Bludworth*, 700 F.2d at 1049, 1050; *Gardner v. Bath Iron Works Corp.*, 11 BRBS 556 (1979), *aff'd sub nom., Gardner v. Director, OWCP,* 640 F. 2d 1385 (1st Cir. 1981); *Preziosi v. Controlled Industries*, 22 BRBS 468 (1989); *Janusziewicz v. Sun Shipbuilding and Dry Dock Co.*, 22 BRBS 376 (1989) (decision and order on remand); *Johnson v. Ingalls Shipbuilding*, 22 BRBS 160 (1989); *Madrid v. Coast Marine Construction*, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause or primary factor in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with, or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. *Strachan Shipping v. Nash*, 782 F.2d 513 (5th Cir. 1986); *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *Mijangos v. Avondale Shipyards, Inc.*, 19 BRBS 15 (1986); *Rajotte v. General Dynamics Corp.*, 18 BRBS 85 (1986).

Claimant's credible subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a *prima facie* case and the invocation of the Section 20(a) presumption. *See Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981), *aff'd sub nom. Sylvester v. Director, OWCP*, 681 F.2d 359 (5th Cir. 1982).

I have weighed all the evidence in light of the case law set forth hereinabove and find that Claimant has proven that she did suffer a job related injury while employed as a Class A operator by Agrifos. Respondents contend that Claimant's back and hip complaints were caused by the 1990 injury, combined with a car accident and congenital conditions. However, it is well established that Claimant performed heavy manual labor while working for Employer and its predecessor for approximately thirteen years. TR at 35, 37, 143. Additionally, Claimant's husband, with 36 years of experience at the plant, testified that managers and supervisors for Agrifos continued to employ Claimant for manual labor even though they knew about Claimant's July 1990 injury. TR at 152. While Claimant may have suffered from a disability for several years after the 1990 incident, Claimant's condition was asymptomatic for several years prior to the 1998 injury. TR at 103, 104. Dr. Watters opined that from a medical merger standpoint, Claimant's 1990 injury was not serious because Claimant was working at heavy labor after the incident, and eventually stopped treatment. CX 18 at 46. The work Claimant performed for Employer after the 1990 injury and prior to the 1998 injury, including climbing, twisting, bending, kneeling, crawling, lifting, and standing for long periods, allows the undersigned to conclude that Claimant's present condition is industrially related. Based on the medical records and Claimant's credible subjective complaints, the undersigned finds that Claimant incurred an injury to her lower back and right hip on November 24, 1998, independent of her 1990 injury.

The Nature and Extent of Claimant's Disability.

The burden of proving the nature and extent of disability rests with Claimant. *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1980). Claimant has the burden of proving the nature and extent of her disability without the benefit of the Section 20 presumption. *Carroll v. Hanover Bridge Marina*, 17 BRBS 176 (1985); *Hunigman v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 141 (1978). Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept. Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and her inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss, or a partial loss of wage earning capacity.

In the present case, Claimant first missed work on January 31, 2000 when Dr. Landon restricted her from any further work for Employer. TR at 54. Since Employer did not have any "light duty" work available, Employer was unable to accommodate Dr. Landon's work restrictions for Claimant. TR at 57, 143-144; CX 21. Subsequently Claimant participated in a surgical technician training program and some computer training, at the direction of Eva Haier, a Department of Labor vocational counselor. TR at 57. Dr. Watters and Ms. Haier had Claimant withdraw from the surgical technician training program, despite her successful completion of the classroom training, because the hospital training aggravated Claimant's condition. TR at 62. At Ms. Haier's direction, Claimant applied for numerous "light" and sedentary entry level jobs before she accepted a part-time job at Kohl's for up to 30 hours per week in the regular season and up to 38 hours per week during the holidays. TR at 68, 69. Respondents contend that Claimant is underemployed and that her true wage earning capacity range lies between $12,584 to $35,000 annually, according to their labor market survey. RX 23 at 12. However, Claimant did not receive any higher paying or more attractive job offers and Claimant was told by several employers that she would not get the $8 per hour that she requested in her applications. TR at 74. Thus, the undersigned finds that Claimant's $7.50 hourly wage at Kohl's is the best indication of Claimant's earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, *pet. for reh'g denied sub nom. Young & Co. v. Shea*, 404 F.2d 1059 (5th Cir. 1968) (per curium), *cert. denied*, 394 U.S. 876 (1969). A claimant's disability is permanent in nature if she has any residual disability after reaching maximum medical improvement. *Trask*, 17 BRBS at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. *Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 BRBS 231 (1984).

Claimant testified that she continues to experience some discomfort and pain from her condition, but she can work through it. TR at 69. Claimant received medical treatment intermittently from Drs. Landon and Watters from April 1, 1999 through December 18, 2003, the date of MMI stipulated to by the parties. Claimant was to follow up with Dr. Watters as needed, and Claimant has not seen Dr. Watters since he provided his last work restriction evaluation on November 1, 2004. CX 18 at 34. Dr. Watters also testified that on January 5, 2004 Claimant had a five percent whole body impairment rating. CX 18 at 30, 31. Accordingly, the undersigned finds that Claimant was totally temporarily disabled from the date Dr. Landon took her off work for Employer on January 31, 2000, until Claimant reached MMI on December 18, 2003. Between the date of MMI and when Claimant began working for Kohl's, the undersigned finds that Claimant was totally permanently disabled. Finally, the undersigned finds that Claimant has been partially permanently disabled since she began working for Kohl's on November 7, 2004.

Compensation

Claimant's compensation is based on her average weekly wage, which is calculated using one of the methods described in Section 10 of the Act. 33 U.S.C. § 910(a)-(d); *Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1987). The average weekly wage should reflect a fair estimate of a claimant's earning power at the time of injury. *Orkney v. General Dynamics Corp.*, 8 BRBS 543 (1978). In the instant case, the parties stipulated that Claimant's average weekly wage was $1087.92.

For total disability, whether temporary or permanent, Claimant is entitled to compensation at the rate of 66 2/3 percent of her average weekly wage. 33 U.S.C. § 908(a)-(b). Accordingly, Claimant should be compensated at the rate of $725.28 from February 1, 2000 through November 7, 2004. Respondents have paid Claimant $725.28 per week since February 1, 2000 and continuing at least through the date of trial.

For permanent partial disability, Claimant is entitled to compensation at the rate of 66 2/3 percent of the difference between her average weekly wage and her post-injury wage earning capacity. 33 U.S.C. § 908(c)(21). Claimant was paid $7.50 per hour by Kohl's since her starting date on November 7, 2004. The amount Respondents owe Claimant for permanent partial disability beginning on November 7, 2004 and continuing may be administratively calculated by the District Director. Also, Respondents are entitled to a credit for overpayments beginning on November 7, 2004 when Claimant was partially disabled but was receiving total disability payments. This amount may be administratively calculated by the District Director.

Employer's entitlement to Section 8(f) Relief.

Under Section 8(f) of the Act, the employer may obtain limited relief by showing that:

(1) Claimant had a pre-existing, permanent partial disability;
(2) the pre-existing disability was manifest to the employer prior to the second injury; and
(3) the current disability is not due solely to the employment injury.

33 U.S.C. § 908(f); *see Two R Drilling Co. v. Director, OWCP*, 894 F.2d 748, 750 (5th Cir. 1990); *Eymard & Sons Shipyard v. Smith*, 862 F.2d 1220 (5th Cir. 1989); *Dove v. Southwest Marine of San Francisco*, 18 BRBS 139, 142 (1986).

Respondents contend that they are entitled to Section 8(f) relief. Respondents claim that Claimant's spondylolisthesis, as well as her 1990 injury, combined with the 1998 injury to make her current disability greater than would have resulted from the subsequent injuries alone. The undersigned finds that Respondents are not entitled to Section 8(f) relief, for the reasons given by the Director of the Office of Workers' Compensation Programs for the United States Department of Labor.

Initially, Employer did not meet its burden of proof in establishing entitlement to Section 8(f) relief since it did not meet the first 8(f) requirement. *See Peterson v. Columbia Marine Lines*, 21 BRBS 299, 304 (1988). The Employer did not submit sufficient evidence to establish that Claimant was permanently disabled prior to her 1998 accident. After Claimant's 1990 injury she continued to perform heavy manual labor duties that were necessary to her job as an operator. TR at 35, 103, 143. Employer did not treat Claimant as a disabled person and Claimant did not act like a disabled person. Rather, Claimant continued to crawl, climb, lift, push, and shovel in order to load and unload hazardous and non-hazardous materials on the docks. TR at 35, 36. In Dr. Watters' December 21, 2004 deposition he testified that the Claimant's need for the surgery and other care stemmed from her November 1998 accident. CX 18 at 38. Thus, the undersigned finds that Employer failed to prove that there was a lasting pre-existing physical problem under Section 8(f). As Respondents did not establish a pre-existing permanent partial disability, there is no need to consider the arguments relating to the manifestation and contribution requirements.

Entitlement to Medical Expenses.

Where a claimant has demonstrated that she has suffered from a compensable injury under the LHWCA, the employer is required to furnish medical, surgical and other attendant benefits and treatment for as long as the nature of the recovery process requires. 33 U.S.C. § 907. The claimant must establish that medical expenses are related to the compensable injury and are reasonable and necessary. *Pardee v. Army Force Exchange Service*, 3 BRBS 1130 (1981); *Pernell v. Capital Hill Masonry*, 11 BRBS 532, 539 (1979). The medical expenses are assessable against the employer so long as they are related to the compensable injury. *See Pardee, supra.*

Therefore, the undersigned finds Respondents are liable for all outstanding medical bills related to Claimant's disability arising from her hip and back injuries sustained in the November 24, 1998 accident, and the Employer shall furnish reasonable, appropriate and necessary medical care and treatment as required by Section 7 of the Act.

Interest On Past Due Benefits, If Any.

Claimant is entitled to interest on any accrued unpaid compensation benefits. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 556, 559 (1978), *aff'd in part, rev'd in*

part sub nom., Newport News Shipbuilding & Dry Dock Company v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). Interest is mandatory and cannot be waived in contested cases. *Byrum v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 833 (1982); *MacDonald v. Sun Shipbuilding & Dry Dock Co.*, 10 BRBS 734 (1978). Accordingly, interest on the unpaid compensation amounts due and owing by the Employer, if any, should be included in the District Director's calculations of amounts due under this decision and order.

Assessment of Attorney Fees and Costs, If Any.

Thirty (30) days is hereby allowed to Claimant's counsel for the submission of such an application. *See* 20 C.F.R. § 702.132. A service sheet showing that service has been made upon all the parties, including the claimant, must accompany this application. The parties have fifteen (15) days following the receipt of any such application within which to file any objections.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations may be administratively calculated by the District Director.

It is therefore **ORDERED** that:

1) Respondents Agrifos LP and/or Zurich American Insurance Company shall pay Claimant compensation for her unscheduled injuries as total temporary disability from January 31, 2000 through December 18, 2003, and for total permanent disability from December 18, 2003 through November 7, 2004, at the rate of $725.28 per week, and partial permanent disability commencing from November 7, 2004 and continuing at a figure of 2/3's of the difference between claimant's average weekly wage of $1087.92 and her actual earnings per week at Kohl's to be determined by the District Director. Respondents shall also pay interest on accrued unpaid amounts due, if any, and are entitled to a credit for all amounts previously paid.

2) Respondents shall furnish such reasonable, appropriate, and necessary medical care and treatment as Claimant's condition may require, subject to the provisions of Section 7 of the Act.

A

Russell D. Pulver
Administrative Law Judge